February 27, 2007

Commission's Secretary
Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: WC Docket No. 06-210
CCB/CPD 96-20

COMMENTS REGARDING RESPONDENTS COMMENTS ON PETITIONERS REQUEST FOR RECONSIDERATION AND CLARIFICATION OF FCC ORDER OF JANUARY 12, 2007

To Whom It May Concern:

We have reviewed both Petitioners' and Respondents' prior filings regarding the FCC's January 12, 2007 order. We respectfully disagree with the FCC's belief that the scope of the District Court's June 2006 order is limited to only the so called "traffic only transfer issue". We therefore continue to support Petitioners' request for reconsideration of the January 12th FCC order through our filed comments on February 14, 2007 pointing out many compelling points in favor of reconsideration, including quotes from Respondents' itself taken from their own prior legal filings before both the District Court, the FCC and D.C. Circuit Court.

This filing is in response to the Respondents' filed comments February 20, 2007, regarding Respondents' opposition to Petitioners' reconsideration request, which was supported by 800 Services, Inc., Larry G Shipp and Combined Companies, Inc. (CCI). The issues is reconsideration and clarification of the FCC's January 12, 2007

order. Combined Companies Inc., (CCI) and I (collectively "we") would like to supplement its initial comments on this matter and direct its further comments to Respondents' opposition.

In review: We find no support of law submitted by Respondent that somehow limits Petitioner's right to file a Declaratory Ruling Request of its own definition before the FCC. Although Respondent would like the FCC to believe that its view of what the rights of Petitioners are should prevail, and therefore "limit" Petitioner to ONLY what Respondent would like the FCC to reluctantly rule[1].

Respondents' February 20, 2007 FCC filing interjects, mischaracterizations, baseless conclusions, and its own "spin" on what the FCC should and should not do. However, there is not one factual dispute within any of these filings, by Petitioner or Respondent. Rather, it is clear, as it has been for some time, that the disagreement is based upon interpretation of the underlying tariff in the transfer of traffic only from CCI to Public Service Enterprises (PSE), and, just as important, the additional other "open issues"[2] of "tariff interpretation" dealing with, among

[1] There can be no dispute that any fair minded review of the legal proceeding between the parties shows that Respondent has conveniently argued before the FCC that the District Court should be the sole arbitrator of the case; while arguing before the District Court that the FCC, under the doctrine of "primary jurisdiction" should determine the tariff issues used by and relied upon by CCI and Petitioners in contractual relationship with Respondent. Respondent is simply playing games.

[2] The FCC must resolve all "open issues" as it is the only agency with a mandate from Congress extending it broad powers to rule on tariff issues involving the conduct of the parties in their actions and obligations to each other that is the basis for the litigation between the parties; and only the FCC can properly "interpret" both the meaning, effect,

other things: the Respondents' illegal remedy conduct in applying shortfall charges on CCI's end-user bills in SPECIFIC violation of Respondents' section 3.3.1.Q item number 10.

All these matters form the basis of the District Court's referral to the FCC, and therefore must be decided by the FCC. The FCC's view of the District Court's referral was that it was not explicit and therefore on that basis the FCC believes it does not have to expand the scope; however Petitioners' specifically requested for Declaratory Rulings on these and other issues within its "Request for Declaratory Ruling" filed in September 2006. These issues, as AT&T asserted to the District Court cannot be decided by the District Court, and therefore must be decided by the FCC.

A. THE "OPEN ISSUES" ARE TARIFFED ISSUES

1. We agree with Petitioners and AT&T that whether the plans were grandfathered or not has no bearing on which obligations transfer on traffic only transfers. There is no relationship between the June 17th 1994 grandfather provision and section 2.1.8. Although there is no tariff relationship, there is a question of propriety. AT&T has continually asserted that S&T obligations transfer on traffic only transfers. Therefore, even though there is no tariffed relationship between the June 17th 1994 grandfather provision and section 2.1.8; the propriety of demanding S&T obligations that couldn't be charged due to grandfathered immunity was a **propriety**

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and obligation of each of the parties to each other under the tariff(s) Respondent filed with the FCC which are the subject of Petitioners' Declaratory Ruling Request.

issue which would be a violation of 201(b) as it would be "unjust and unreasonable" if S&T obligations really did transfer on traffic only transfers, which they do not.

2) Respondent cleverly tries to attribute a position to petitioners that it never made. Petitioners never stated that PSE was supposed to assume S&T obligations under 2.1.8. Petitioners have always maintained that S&T obligations do not transfer on traffic only transfers. Respondent then takes this absurd position further by asserting that petitioners then "supported the position that it never made" with its correct position that its plans were immune from S&T obligations---- so PSE did not have to assume the S&T obligations! Surely the FCC can see that the AT&T ruse is to attribute the undisputed fact that the plans were immune from S&T obligations, to one in which obligations transfer on a traffic only transfer. There is no correlation. The S&T immunity only counters AT&T's fraudulent use assertion where AT&T took the position that S&T obligations did not transfer on traffic only transfers. S&T obligations do not transfer on traffic only transfers no matter whether the plans are grandfathered or not.

AT&T fabricates what petitioners position was ….AT&T states that petitioners argued that the plans were immune from shortfall and termination, and therefore the shortfall and termination obligations did not have to be assumed by PSE. Petitioners never took such a position. Whether the plans were immune or not, shortfall and termination charges did not transfer under 2.1.8 on traffic only transfers as many of AT&T's counsels admit.

Petitioners only noted that the plans were immune from shortfall only to counter AT&T's position that the CCI plans that remained with the shortfall and termination obligations were not going into shortfall. It was a counter to AT&T's fraudulent use position on CCI's plans, not a position that shortfall and termination obligations didn't have to transfer because the plans were in fact immune from shortfall and termination obligations. All parties agree that being immune from shortfall and termination obligations does not have anything to do with whether or not plan obligations transfer on traffic only transfers. There is no disputed fact here. The tariff's joint and several liability provisions clearly dictate that S&T obligations do not transfer on traffic only transfers.

As the FCC can see the joint and several liability provision (see Exhibit A following) only pertains to PLAN TRANSFERS - Not Traffic Only Transfers. Sub paragraphs (a) and (c) addresses the plans shortfall charges and (b) addresses the plans termination charges; <u>all plan obligations.</u> The duration that a transferor is to remain jointly and severally liable on a traffic only transfer is obviously not addressed because the actual plan obligations do not transfer on a traffic only transfer. The actual plan obligations stay with the CCI plans.

Also notice that the coding symbols did not indicate a change in November 1995's 2.1.8E (Exhibit AA in Petitioner's 9/27/06 FCC filing) nor did they indicate a change in this May 1996 version of 2.1.8. Therefore, this clearly indicates that the interpretation of 2.1.8 in January 1995 was that it also only pertained to joint and several liability remaining **<u>only on plan transfers</u>.**

AT&T argues that subsequent versions of 2.1.8 are not "controlling". However, AT&T misses the point. The FCC can, and should, utilize the laws on tariff coding symbols on subsequent revisions to 2.1.8 (November 1995 & May 1996 & Feb 2002 exhibit J to petitioners filing) to work backwards and detect what AT&T's own interpretation was in the **January 1995 version of 2.1.8.**

The tariff coding symbols let you know that the joint and several liability analysis was never changed from only applying to only plan transfers. Subsequent versions simply fully detailed that shortfall and termination obligations do not transfer on traffic only transfers. The tariff doesn't lie (and as Judge Politan has often been quoted as say …. "words mean what they say".. AT&T's own concession in 2003 (exhibit Z in petitioners filing) that Petitioners plans were not jointly and severally liable on the traffic only transfer, destroy AT&T's new argument.

The duration that a transferor would remain jointly and severally obligated for shortfall and termination obligations on a **plan transfer** did change from January 1995 to November 1995 to May 1996; however there was **never a change** in the fact that joint and several liability provisions of the tariff did not pertain to traffic only transfers as the Petitioners have already detailed in its comments.

Of course this was the same position that AT&T (petitioners Exhibit Z) had until it needed to change it twelve years after the January 1995 attempted traffic only transfer.

AT&T attempts to appoint a position that was never made by CCI or petitioners, then further appoints to petitioners a twisted argument never made by petitioners or CCI for the appointed position, in which the parties both acknowledge fails.

The bottom line is that there is no dispute that the plans were immune from shortfall and termination obligations and that plan obligations simply do not transfer on traffic only transfers as the tariff clearly indicates and as many AT&T counsel supported petitioners.

3) AT&T also asserts that the argument over the pre June 17th 1994 plans had only to do with the traffic only transfer issue. This is also false. The FCC asked for supplemental briefs having to do with the June 1996 S&T infliction. AT&T creates a bogus position that the pre June 1994 grandfathering argument only was in relation to the traffic transfer issue. Petitioners were killing two birds with one stone.

4) As petitioners detailed on page 20 para 48 of its January 31, 2007 comments, the FCC Decision clearly states that both parties addressed the June 1996 shortfall infliction issue in separate filings with the FCC that were added to the Declaratory Ruling proceedings dealing with the traffic only transfer. The FCC's 2003 Decision clearly shows that the dates of the FCC filings by AT&T and petitioners are **August 26, 1996**, and **September 23, 1996;** obviously after the **June 1996** shortfall infliction. See the FCC says the shortfall infliction was a separate issue…

FCC 2003 Decision Page 4 para 7

> On July 15, 1996, the aggregators filed a petition with the Commission in which, "based on established Commission practice, policies, and precedents, the plain language of § 203 of the Communications Act of 1934, as amended, F.C.C. Rule 61.54(j), and Sections 201 and 202 of the Act," they sought declaratory rulings on four issues. **By separate cover motion**, the aggregators **also sought expedited consideration** of their petition for declaratory ruling because, they alleged, AT&T was **unlawfully billing certain charges to the**

aggregators' end-users. AT&T filed Comments in Opposition on **August 26, 1996**, and Petitioners filed Reply **Comments on September 23, 1996.**

5) Respondent also stated that the shortfall issue was discussed during oral argument and therefore implies that it was discussed in regard to PSE's assumption of S&T obligations. This is not correct. It was discussed in terms of how CCI/Petitioner was to meet the commitments on the plans that remained with the actual S&T obligations. AT&T forgets that the DC Circuit had the grandfathering issue fully briefed as Judge Ginsburg completed the FCC's counsel's sentence:

> FCC's MR. BOURNE: Well, CCI still had the obligation to pay its shortfall charges, and there's, there are **other aspects to this that the Commission didn't rule on. I mean, for instance --**
> JUDGE GINSBURG: **Whether they were grandfathered?**
> MR. BOURNE: **Right. So it could well be that there were little or no shortfall charges. The Commission didn't rule on that point, but if there were little or no --**
> JUDGE GINSBURG: If that was the understanding with which they went into this, then the nature of the scheme was to move the obligation to a customer who, away from a customer who would be able to shed its obligations under the grandfather provision, right? Or pardon me, if the Commission agreed that it was grandfathered under the old tariff. That's the scheme, to **move it from somebody who's got the benefit of grandfathering and can get out of its obligation that way to somebody who's got the benefit of a larger discount.**
> MR. BOURNE: **That's correct.**
> JUDGE GINSBURG: **Okay.**
> MR. BOURNE: There's another possibility is that if the transaction were to occur **mid-year,** for instance, and a carrier had **already met its minimum usage obligations**, then there wouldn't be any issue of -- now, I don't know the answer to that, but there --

6) The above quote regarding the pre June 17th 1994 grandfathering provision is in relation to one of the ways the CCI/Petitioner plans could meet its **remaining S&T obligations**. Neither the FCC nor petitioners ever suggested that the undeniable fact that the plans were immune from S&T obligations dictated which obligations

transfer under 2.1.8. AT&T's position to the District Court of 6/13/05 at Page 2 para 3 clearly states that the pre June 17th, 1994 grandfather issue was an open issue that was argued in reference to **whether shortfall could be applied to the plans**, not in terms of whether S&T obligations should transfer on traffic only transfers:

> Rather than reinstitute the proceedings at the FCC, the Inga Companies have now asked this Court to resolve the **open issues** and to rule on a series of technical issues of tariff interpretation. Under their view, the Court should now determine such matters as whether the phrase "all obligations" in Section 2.1.8 somehow excludes minimum volume/term commitments; whether these commitments are part of the "minimum payment periods" within the meaning of 2.1.8; whether the plans in question are **"pre 1994" plans to which shortfall charges allegedly could not apply;** and what significance was of AT&T's withdrawal of a subsequent tariff transmittal-- and to resolve these tariff issues in a manner consistent with the **nondiscrimination requirements** of 47 U.S. C. Section 202(a) and of the FCC's implementing regulations. ***All*** **these issues were previously raised in the FCC and the DC Circuit proceedings, and all these issues can be efficiently decided by the FCC now--under the DC Circuit Decision.**
>
> In light of the DC Circuits decision, it is understandable that the Inga Companies would want to try to shift forums mid-stream and to re-litigate these technical tariff and other issues in a Court outside the DC Circuit. But this forum shopping is not only itself illicit; **it is barred by the terms of this Courts stay, by the Third Circuit's earlier mandate and by the doctrine of primary jurisdiction**.

AT&T to the District Court 6/13/05 2005 Page 11 para 1:

> The Inga Companies did not respond to the DC Circuit's January 2005 Opinion by asking the FCC to revisit the question of tariff interpretation in light of the Courts of Appeal's rejection of the FCC's initial interpretation.[3] **The Inga Companies did not act even though they solicited the advice of the FCC's General Counsel, who told the Inga Companies that they have the option to pursue further proceedings with the FCC to address any issues that were left open by the DC Circuit's Opinion**[4]

[3] The fact is petitioners counsel did ask the FCC if the DC Circuit Decision was in the FCC's viewpoint a remand or not, as the decision was not explicit on this, and the FCC stated it was not a remand; therefore petitioners went back to NJ.

[4] What the FCC general counsel stated was that petitioners could define any issues it wanted, whether or not it was an open issue before the DC Circuit.

> Instead, Plaintiffs filed in this Court a series of Certifications from Mr. Inga and later this motion in this Court in an attempt to have this Court, not the FCC, decide the tariff interpretation issues that this Court and the Third Circuit have held to be matters for the FCC (and the DC Circuit).

Clearly AT&T is admitting that all the issues that petitioners raised regarding shortfall infliction and discrimination are before the FCC.

7) Why didn't AT&T's February 20th 2007 comments address AT&T's earlier comments made in 1996 and 2003----- that the pre June 17th 1994 issue was "ripe" and should be decided?

AT&T's **1996** Joint Petition for Declaratory Ruling Page 3 para 1

> As to this issue, **which does not require any findings as to disputed facts**, the Commission should rule that shortfall charges may be imposed where, as here, post
> **June -17th 1994** CSTPII replacement plans are discontinued or reach an anniversary date.

AT&T's **1996** Joint Petition for Declaratory Ruling Page 14 para 2

> **Petitioners have identified an issue which is currently ripe for a declaratory ruling**; i.e., whether "**pre-June 17th, 1994** CSTPII plans**, as are involved here,** may never have shortfall charges imposed, as long as the plans are restructured prior to each one-year anniversary. "**No factual questions surround this question"**

AT&T's CORP. **2003** FURTHER REPLY COMMENTS TO FCC Page 3 para 1:

> Accordingly, the Commission should deny the Joint Petition, **and should instead issue the ruling requested by AT&T in its Comments filed in 1996 that shortfall charges** may be imposed where, as here, post-**June 17, 1994 CSTP II** replacement plans are discontinued or reach an anniversary date.

We note that Petitioners figured that AT&T would come up with a clever cover-up for its former position that the pre June 17th 1994 grandfathering issue was "ripe".

Maybe like "What AT&T's counsels were actually referring to as being ripe were **"de minims"**[5] pre June 17th 1994 grandfathering provisions" not found in the tariff.

8) We would also like to address, as did Petitioner, AT&T's footnote:

> FOOTNOTE 1: As AT&T explained in its Opening Comments, at 17 n.9, PSE still violated Section 2.1.8 because it refused to accept any of CCI's obligations, including those explicitly enumerated in section 2.1.8.

Here, AT&T is subscribing to the old (albeit improper) notion that if it actually says something is true (even it is not) it says it becomes reality. **AT&T provides nothing in the record where PSE states that it wants to assume zero obligations.** However, also missing from Respondents' is the undeniable fact the PSE (in accepting the transfer from CCI and submitting it to AT&T) DID assume the only ones explicitly enumerated in section 2.1.8. AT&T initially did make its "PSE did not assume" statement in the DC Circuit Oral argument. Imagine, AT&T says it believed since the January 1995 traffic only transfer that PSE wanted to assume NO OBLIGATIONS, but AT&T just didn't get around to mentioning this until November 11th 2004! In the mean time AT&T told every court and the FCC that PSE did assume the only two obligations enumerated within 2.1.8 in Jan 1995; and the only ones that need to be transferred/assumed on a traffic only transfer.

9) The FCC needs to review petitioners overwhelming evidence on page 89 para 221-page 99 para 247 under the heading:

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[5] AT&T attempted to cover up for AT&T counsel David Carpenters admission: "what obligations transfer depend upon what is transferred" by comically stating that what Mr. Carpenter what referring to were "**de minims"** traffic only transfers as if such a tariff provision existed.

> XVII Despite the Court Decisions and AT&T's Prior Concessions that PSE Attempted to Assume the Proper Obligations AT&T Flat Out Lies that PSE Wanted to Assume Zero Obligations

Within that section Petitioner presented evidence that AT&T conceded that PSE assumed the only obligations necessary and the only ones enumerated on the TSA in Jan 1995. It shows AT&T conceding to the Third Circuit that PSE assumed these account obligations. AT&T also conceded to the FCC in 2003 that PSE assumed the only two obligations needed on a traffic only transfer. The evidence is overwhelming against AT&T. There is no dispute between AT&T and petitioners that AT&T first raised its "new obligations" defense about 10 years after section 2.1.8's statute of limitations period of 15 days.

10) AT&T's 2/20/07 brief on page 2 paragraph 1 asserts:

> The entirely separate issue that petitioners and their supporters now improperly seek to raise involves the **propriety** of AT&T's imposition of shortfall charges on CCI's end-users in June 1996, 18 months after AT&T refused to process the proposed traffic transfer that is the subject of the referral.

Above AT&T stresses that the June 1996 shortfall infliction occurred 18 months after the Jan 1995 traffic only transfer. However AT&T based the **propriety** of denying the traffic only transfer on its ability to collect shortfall charges. The grandfather provision was in June of 1994 (**6 months prior** to the traffic only transfer) and it is not disputed that at the time of the traffic only transfer the plans were all immune from S&T obligations; therefore AT&T's reliance on **fraudulent use claims were totally bogus and thus a violation of 201(b)**. Therefore based upon AT&T's continuing to argue fraudulent use claims, the propriety of also addressing

the non disputed pre June 17th 1994 grandfather issue, in and of itself, makes the grandfather issue one the FCC must rule on. The DC Circuit certainly was interested in knowing whether the plans were grandfathered.

11) Besides the propriety of addressing the grandfather issue as it relates to the traffic only transfer issue (201(b)), the grandfather issue must be decided on its own merits as to the June 1996 shortfall infliction. Petitioners have already evidenced at page 20 para 48 in petitioner's 1/31/07 filing that the FCC had both parties **separately** brief the June 1996 shortfall infliction issue already and the 190 phone bills from June 1996 were added to the record. Additionally there are no disputed facts that the plans were still immune through 1995 and AT&T can not dispute that the FCC's Oct. 1995 Order (exhibit DD to petitioners 9/27/06 filing) further extended the grandfather through Oct 1996. AT&T also can not, and did not dispute that its tariff on August 29th 1996 further extended shortfall immunity by providing a 100% shortfall credit. See page 5 of exhibit FF at (c) in petitioner's initial filing which states:

> AT&T will provide a credit on shortfall if the customer does not meet **first year shortfall commitment.**

12) Additionally Respondents' do not dispute that it illegally prohibited petitioners from enrolling AT&T LSTPII end-users into its plans on a restructured contract. This prohibited the enrolling of millions of dollars in additional revenue as AT&T had locked up a considerable amount of its base of customers on term contracts when toll free portability came out on May 1st 1993. Petitioners Declaratory Ruling

request shows how AT&T violated section 2.5.7 (Waiver of Shortfall Due to Circumstances Beyond the Customers Control).

13) We support Petitioners' position that "Whether Judge Bassler intended to include the pre June 17th 1994 grandfather issue or not is irrelevant". The only thing that is relevant is that this is a requested declaratory ruling, that AT&T itself had asked to be decided, that has no disputed facts, and as AT&T itself stated was "ripe" for a FCC decision. AT&T believes you can change the rules in the middle of the game.

Judge Politan said it best in the District Court's non vacated Decision which the FCC also quoted in its 2003 decision:

> Plaintiffs cannot be held to construe the section governing transfers under the tariff as meaning that which it does not. Words mean what they say. **Rules should not be changed in the middle of the game; and certainly without notice.**

14) AT&T asserts on page 3:

> The entirely separate issue that petitioners and their supporters now improperly seek to raise involves the propriety of AT&T's imposition of shortfall charges on CCI's end-users in June 1996,18 months after AT&T refused to process the proposed traffic transfer that is the subject of the referral. **This "illegal remedy" issue does not implicate the scope of § 2.1.8 at all**, and it was manifestly not part of the original primary jurisdiction referral.

AT&T is correct that the shortfall application illegal remedy has nothing that "directly

Impacts"[6] section 2.1.8; however AT&T raises zero disputed facts as to why the infliction in June 1996 was not an illegal remedy, and therefore appropriately "ripe" for Petitioner's Declaratory Ruling Request, and precisely the kind of "open issue" the FCC and not the courts should decide. As the FCC's 2003 decision stated on Page 13 Footnote 87

> Given our conclusion that AT&T violated section 203 of the Act, it is unclear what additional fact-finding on these issues is necessary.

15) The FCC is correct. Therefore sending this issue back to the District Court or using our suggestion within our February 14, 2007 filing of having petitioner's seek mandamus from the DC Circuit is not necessary, given the fact that AT&T acknowledges it violated its tariff at section 3.3.1.Q bullet 10

16) Further we would like to point out that AT&T's statements that petitioner's were **solely** arguing the traffic transfer issue is completely false as the evidence clearly shows. In any event AT&T's argument is irrelevant as AT&T does not show any evidence that there are disputed facts involving the pre June 17th 1994 issue,

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[6] Although AT&T's shortfall application illegal remedy does not directly impact 2.1.8 it must be noted that the FCC's position within the 2003 Decision that AT&T could not **speculate** that petitioners would not be able to meet its commitments is supported here.

> AT&T's apparent **speculation** that CCI would fail to meet these commitments and would be judgment-proof did not justify its refusal to transfer the traffic in question. FCC's 2003 Decision.

The point the FCC made was that AT&T **could not speculate** because things like illegal remedies do happen. Due to the shortfall application illegal remedy AT&T would not have been able to rely upon the shortfall it bogusly **speculated** was a certainty; despite the plans being grandfathered. So in this way the shortfall application illegal remedy supports the FCC's position on the 2.1.8 traffic only transfer.

the shortfall application illegal remedy, the violation of section 2.5.7. and the discrimination issues. And, even if they did, it would only be "their interpretation" of these tariff(s), which arguably different from Petitioners' interpretation, which is precisely the reason that the FCC is mandated to "interpret" and rule and thereby settle these matters of interpretation once and for all.

17) With all due respect, we believe that a review of both Petitioners, 800 Services, Inc., Larry Shipp and CCI, as well as Respondents' filings before the FCC will conclude only one thing: That there is the undisputed fact that there are no disputed facts – only disputed interpretations - regarding the traffic used to transfer traffic from CCI/Petitioner to PSE (Tariff 2, Section 2.1.8), the pre June 17th 1994 issue, the shortfall application illegal remedy, section 2.5.7, and discrimination issues, thus all must be decided.

18) AT&T asserts on page 5 footnote 5

> Employing characteristically tortured logic, petitioners "construe" counsel's statement that discrimination "is a fact question and you can litigate those fact questions," *see id.,* as a purported admission "that AT&T did thousands of these traffic only transfer without S&T obligations transferring." Ptrs' Reply Comments at 154. Obviously, in stating that this claim could be *"litigated"* AT&T's counsel was not conceding anything Similarly, petitioners quote then-Judge Roberts' statement at oral argument that he thought the record showed that AT&T permitted transfers without all obligations transferring. *Id.* But petitioners omit the response by AT&T's counsel: "There w[ere] allegations made that we did that. *We disputed that."* Exh. 5 attached hereto (emphasis added).

AT&T's defense above is that it said "*We disputed that."* Well, let's examine that. Judge Roberts and Judge Bassler both examined the evidence and both Judges

understood that AT&T routinely allowed the transfer of traffic only, and no shortfall or termination obligations were transferred. In fact, in support of that statement, Petitioners submitted to the FCC in 2003 fellow aggregator Robert Collette's certification stating that he moved virtually all of his traffic to PSE and his CSTPII plans remained with its revenue and associated shortfall and termination obligations and PSE did not have to assume any S&T obligations. AT&T did not provide any evidence disputing that certification. Rather, in recognition of this ability to transfer "traffic only" without the plan itself, AT&T instituted a $50 fee when transferring just traffic only due to the incredible amount of traffic only that was being transferred between aggregators such as PSE and Tel-Save; the two entities that brought legal action against AT&T to get CT-516's discount of 66%[7]. If all obligations were transferred there would be only one $50 fee. Therefore why would any aggregator choose to pay for every account moved if it could pay only one $50 fee if S&T obligations really did transfer on traffic only transfers. An aggregator would never choose to pay for every account transferred if under the tariff it meant in AT&T's world that a traffic transfer mandated all obligations to transfer. AT&T's tariff interpretation of 2.1.8 does not jive with any of the other tariff provisions. Of course AT&T's incredible interpretation of 2.1.8 means that a transferee would be obligated for the bad debt on accounts it was not receiving from its transferor.

[7] See $50 fee tariff fee exhibited at S in petitioners 9/27/06 initial filing

19) AT&T believes that because it simply says "We disputed that", that this statement is enough for the FCC not to rule on parts of Petitioners' Declaratory Ruling. Surely the FCC takes note that AT&T provided zero evidence to the FCC; so when Mr. Carpenter stated "we disputed that", when exactly did AT&T dispute this, and what evidence did it provide when disputing it? It was simply AT&T making yet another gross misrepresentation to the Court. AT&T believes it does not have to show any evidence, or prove anything, as long as it says "it disputes". What are the factual disputes AT&T? **Petitioners last week asked AT&T to point out what specific factual disputes there were regarding these issues? AT&T provides none!** Of course it can not because the issue is so clear that there is nothing to dispute.

20) Not disputed by Respondent is that AT&T initially put the shortfall charges on the end-users bills in June 1996. AT&T under its tariff must initially place the charges on the aggregator customer, and if the aggregator does not pay……..The tariff at 3.3.1.Q bullet 10 states that the shortfall can **only reduce the discounts**, not apply shortfall in amounts 20 times higher than the entire bill; so AT&T can rescue the end-users and bring them back to AT&T. The 190 bills that were in the record are the undisputed facts! (See a sample bill at exhibit NN of petitioners 9/27/06 initial filing). This was not a mistake that AT&T did this. This was willful mis-conduct, an illegal remedy not authorized under AT&T's tariff, and therefore in direct violation of its tariffs. But, even assuming AT&T can somehow be forgiven for that "mistake" how do they explain that they did exactly the same

thing **in March 1997**. Also, AT&T also did not refute that AT&T did the same shortfall application illegal remedy to 800 Services, Inc's end-users in November of 1995. **This is a clear illegal remedy!**

As the FCC has stated:

> Given our conclusion that AT&T violated section 203 of the Act, it is unclear what additional fact-finding on these issues is necessary. FCC's 2003 decision Page 13 Footnote 87

The FCC made it clear to the DC Circuit and the DC Circuit agreed that AT&T could not rely on illegal remedies: The FCC's June 2004 filing to the DC Court of Appeals:

> In essence, the Commission ruled that AT&T had **invoked a remedy other than the ones authorized under its tariff. But the terms of the tariff define and constrain AT&T's conduct and specify the remedies available to the company in connection with its provision of tariff services**. ***See AT&T v. Central Office Telephone Co., 524 U.S. at 222-24***. As this Court recently noted, "filed tariffs are pointless if the carrier can depart from them at will. Orloff, 352 F.3d at 421. Condoning AT&T's departure in this case from the remedial terms of its tariff would "undermine the regulatory scheme" and give AT&T the power to control the economic fates of its customers here, the resellers. The Commission's holding on this issue thus is both consistent with the law and reasonable."

21) The only thing that the FCC can go on is the factual statements made by both Judges that AT&T routinely did (and still does today- see exhibit J to petitioners 9/27/06 filing) transfer traffic only with no plan obligations transferring. **AT&T can not show such evidence because no such evidence exists** despite the fact that AT&T claims it has done tens of thousands of traffic only transfers and continues to do them today.

22) AT&T asserts on page 6 para 1:

> AT&T likewise disputes CCI's deeply flawed and mistaken assertion that it had already met its revenue commitments as of January 1995. *See* CCI's Further Comments Regarding Petitioners Request for Reconsideration.
> [FOOTNOTE]
> [FOOTNOTE]
> Among other things, CCI fails to recognize that minimum revenue commitments are measured on a plan-by-plan basis, not on a net basis across multiple plans.[8]

23) Again AT&T "disputes" without providing anything close to an actual disputed fact. We used AT&T's own exhibit and showed that the plans fiscal year commitments were already met at the time of the traffic only transfer. The numbers don't lie. In only 10 months the plans were already $2 million over where they had to be in 12 months!

24) AT&T's footnote stating that the minimum revenue commitments are measured on a plan-by-plan basis, not on a net basis across multiple plans misses the point. Our analysis showed that at any time CCI could move traffic (traffic only transfer)

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[8] It must be noted that although AT&T states that each plan is measured on a plan-by-plan basis, not on a net basis across multiple plans: Why then did AT&T stop payment to CCI/Inga on all plans in June 1996 when only one plan allegedly went into shortfall? AT&T asserts the next plans did not go into shortfall until March 1997; however AT&T stopped payment on all the plans. When AT&T stopped payment to petitioners on all plans petitioners contacted a few of its end-users and advised them not to pay their phone bills to AT&T and instead pay petitioners 80% of what it was to pay AT&T just to have some money coming in. As per the tariff AT&T would debit the RVPP credits of the plan for 100% of what it was owed. A couple of the end-users called AT&T to confirm that under the tariff this is what would occur to make sure that its bills were paid. Despite the fact that AT&T was to receive 100% of its money, AT&T to make sure that petitioners would be totally choked off of funds to run its business, advised petitioners end-users that it would **disconnect the end-users service** if the end-users didn't continue to pay its bills directly to AT&T. Petitioners were advised by AT&T's staff that did collections on the end-users which were delinquent, that AT&T's legal department had instructed the AT&T collections department to advise all petitioners end-users that AT&T would disconnect its toll free service---- which was primarily used for sales and customer service---the very lifeline of a business! This was yet another illegal remedy as AT&T was being fully compensated for its charges, and there was no reason to threaten end-users who were not their end-users with **disconnection of their phone service.**

from the plans with excess volume to the plans that were under volume. Due to the fact that section 2.1.8 allows for traffic only transfers CCI could at any time easily made-up for any plans revenue volume deficiency.

25) **Furthermore CCI/Petitioner could have at any time simply used section 2.1.8 to simultaneously merge plans that were under and over revenue commitment and a restructure them**. Guess what? That is exactly what CCI and Inga did. AT&T is well aware of the fact that after the combining of plans and restructuring there were only 5 plans left in March 1995, not the eight. The 5 CSTPII/RVPP plans that remained were: 2430, 2829, 3124, 3524, and 3663. All the plans that AT&T originally showed that were running below commitments were no longer running below commitment after the plans being all merged and restructured. The FCC must remember time reduces commitment no matter what usage was on the plan. So whether the plans were over commitment or under commitments made no difference because we had available to us numerous ways under existing tariffs to restructure. As an example, at the time of the Jan 1995 traffic only transfer AT&T knew that its tariff allowed the **merging and restructuring of plans together utilizing section 2.1.8. and therefore AT&T's statement that the plans were treated separately is missing the point** that CCI correctly made in our comments[9].

[9] Section 2.1.8 as thoroughly detailed in the Inga Companies public comments in 2003 to the FCC was utilized for three different types of transfers.
A) Transfer the entire plan, where the commitment level of the transferee on the plan being assumed remains the same as it was in the hands of the transferor with no change in the remaining duration of the contract.
B) Traffic only- where the transferees' existing plan commitment remains the same and the transferee receives additional traffic. There is no change in the remaining duration of the contract

That is why AT&T's Carl Williams certification stressed the **overall commitment remaining** in his certification to the Court. The merging and restructuring of the plans was done months after the traffic only transfer and most importantly it was the first restructure after June 17th 1994 as AT&T can not dispute. Therefore even under AT&T's tariff interpretation, that the grandfather provision allows only a one time benefit on a 3 year plan commitment, AT&T clearly understood the plans were all immune from S&T obligations well into 1997 at the very minimum.

26) What the FCC really needs to understood here is: Given the undisputed fact that AT&T does not dispute, that as of the traffic only transfer date, all of the plans still had not been post June 17th 1994 restructured, makes the revenue commitment analysis **a totally moot argument!!!** 800 Services, Inc pointed out that AT&T's position is that the plans (4 of them according to the testimony of AT&T 's Carl Williams") **would not have made its fiscal year commitment in 1995 if not for the ability to restructure prior to the fiscal year end true up date.**

27) Under AT&T's position then----- the fact that AT&T did not charge S&T penalties to these plans in 1995, that it states were under commitment, conclusively

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Or the commitment level on the plan that is accepting the traffic. **No AT&T Network Services Agreement contract changes are needed because there is no increase in transferee's commitment level or contract duration**.
C) A merging and simultaneous restructuring of two or more AT&T plans into one plan.—where the new plan must have a new term assumption starting date (TASD). The aggregator would indicate whether it wanted a new RVPP ID to take part in new promotions or utilize its existing RVPP ID to maintain grandfathered benefits of the one surviving plan RVPP ID.
The reason why there had to be notations on every AT&T 2.1.8 Transfer of Service Agreement (TSA) is that AT&T needed to know which of the three types of transfers the customer was ordering.

confirms the plans in AT&T's viewpoint had **not** been post June 17th 1994 restructured as of the Jan 1995 traffic only transfer; otherwise AT&T would have applied charges in 1995. AT&T does not dispute the fact that all the plans still had at the very minimum one restructure left (after the traffic only transfer) under the old pre June 17th 1994 rules of not needing to be meeting monthly pro-rata commitments at the time of the restructure. Therefore there is **no disputed fact** regarding whether or not the plans had already met its fiscal year commitments at the time of the traffic only transfer. **It is a moot issue** given the fact that the plans were all immune from shortfall and termination charges in any event.

28) AT&T asserts on page 6 of their February 20, 2007 filing::

> Nothing in the July 2005 email that is ostensibly from Commission Counsel Austin Schlick to petitioners' president, Mr, Alfonse Inga, alters that reality. Mr. Schlick's email **does not discuss the scope** of the referral or advise petitioners that the Commission could or would address issues relevant to claims pending in a District Court when the District Court has not referred those issues under the doctrine of primary jurisdiction. Obviously, neither Mr. Schlick nor anyone else at the Commission has the authority to expand the scope of a district court's referral; such authority would lie exclusively with the district court or the courts sitting over it.

AT&T states that the FCC's General Counsel Mr. Schlick's July 2005 "email does not discuss the scope" of the June 2006 referral. Of course it does not because the Mr. Schlick's email was 11 months prior to Judge Bassler's June 2nd 2006 referral. The point that the FCC's General Counsel was making was that petitioner's would be permitted by the FCC "to define" whatever Declaratory Ruling petitioners wished. It did not matter what the scope of the future referral was to be.

29) We believe, as we, 800 Services, Inc., and as well Petitioners that Judge Bassler's June 2006 referral **did intend to have all open issues addressed** and AT&T believes the only open issue is the traffic only transfer. However, as we stated earlier, whether or not Judge Bassler intended to have the other issues addressed is irrelevant, as petitioners have specifically requested issues which have no disputed facts to be adjudicated by the FCC. AT&T attempts to conflate the FCC's General Counsel's answer with the future referral the District Court Judge Bassler. There is no relationship to what the FCC's General Counsel stated to the referral. The message was clear as could be.

30) On another note AT&T is wrong when it states:

> Obviously, neither Mr. Schlick nor anyone else at the Commission has the authority to expand the scope of a district court's referral; such authority would lie exclusively with the district court or the courts sitting over it.

As previously stated herein, the Commission has broad discretion under the Administrative Procedure Act and Commission rules to decide whether a declaratory ruling is necessary to "**terminate a controversy or remove uncertainty** [5 U.S.C. § 554(e); 47 C.F.R. § 1.2; *see also* 47 U.S.C. §§ 154(i), (j); *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C.Cir.), *cert denied*, 414 U.S. 914 (1973).] When, as here, a petition for declaratory ruling derives from a primary jurisdiction referral, the Commission will seek, in exercising its discretion, to resolve issues arising under the Act that **are necessary to assist the referring court.** Is there really any doubt as to what the court would like to have resolved?

31) There are obviously controversies and uncertainties of interpretation between AT&T and petitioners involving the pre June 17th 1994 grandfather issue, the shortfall application illegal remedy, section 2.5.7 shortfall waiver, and discrimination issues. However, these are NOT FACTUAL DISPUTES that must be resolved. Therefore, besides the fact that these Declaratory Rulings have specifically been requested by petitioners, the FCC absolutely does have the "broad discretion" to resolve these issues, even if the FCC believes that Judge Bassler's "open issues" referral does not encompass the issues.

32) In closing, we believe the record as filed by all the parties to this proceeding will clearly show that: **AT&T and Petitioner's have not provided any disputed facts regarding the following:**

A) Pre June 17th 1994 issue: Both parties agree that the plans hadn't been restructured post June 17th 1994, and that the first plan at the minimum did not become a post June 17th 1994 plan until the June 1996 penalty infliction. AT&T did not dispute that it was under the FCC's Oct 1995 Order to extend the grandfather provision through Oct 1996, and AT&T did not dispute the August 29th 1996 first year 100% shortfall credit. However, what needs to be interpreted is the duration that the 3 year CSTPII/RVPP plans can restructure under the pre June 17th 1994 rules.

B) Section 2.5.7 issue: AT&T did not dispute at all and did not even mention Section 2.5.7 which would waive shortfall obligations in 1994, 1995, and 1996 due to Circumstances Beyond the Customers Control.

C) Shortfall Application Illegal Remedy: There are no disputed facts here either. AT&T acknowledges it billed the end-users for alleged shortfall charges in excess of the tariff remedy of reducing the discounts and they did the exact same thing in 1997! The FCC knows it can and must interpret AT&T's actions as either supported by their tariffs, or an "illegal remedy" upon which AT&T could not rely.

D) Traffic Transfer Discrimination: AT&T produced zero evidence to counter the Judge Basslers, and Judge Roberts positions that AT&T routinely allowed its customers to transfer traffic only without transferring shortfall and termination obligations.

E) Access to Contract Tariff Discrimination: The FCC is most familiar with its rules and policy then in affect regarding customer's right to obtain a Contract tariff. There are no disputed facts here either. Petitioners evidenced Judge Politan's statements that petitioners were denied access to a contract tariff. AT&T did not provide access to petitioners own CT or one that was available within the 90 day open public period. AT&T simply states it was under no requirement to give petitioners access to a deeper discounted plan even if petitioners obviously qualified for such plans.

F) 15 Day period Within Section 2.1.8: AT&T does not dispute that it did not notify petitioners within 15 days. AT&T simply states that the 15 days should not be interpreted as a "statute of limitations period". Additionally, AT&T did not dispute that later versions of section 2.1.8 clarified that the 15 days <u>was a statute of limitations period</u>. What's the right interpretation? The FCC needs to clarify whether this Declaratory Ruling will be adjudicated by the FCC. Any ambiguity in the tariff is construed against AT&T by law.

G) Violation of 201(b) Issue: AT&T does not dispute that the plans could be restructured after the traffic only transfer date and therefore it was in violation

of 201(b) for unjust and unreasonable use of its fraudulent use provisions, given the undisputed fact that the fiscal year commitments were not at issue due to being grandfathered at the time of the traffic only transfer.

For these and many other previously submitted reasons, we respectfully request that the FCC reconsider and clarify its Jan 12th 2007 Order. If the FCC will not adjudicate all the Declaratory Ruling Requests of petitioners the DC Circuit and/or the District Court will need further clarification as why the FCC will not rule on these issues.

Given the fact that all these issues have been extensively briefed and there are no disputed facts, is the FCC simply looking for additional specific orders stating to rule on these issues? Since there are no disputed facts evidenced by AT&T a hearing in the NJ District Court on issues that the Court has already clearly understood in 1995 will just cause further delay and the issues are all coming right back to the FCC again anyway. Respondent has played this game well, and its very successful strategy of "Delay, Deny, Defend" – which has strung this matter out over 12 years, should be acknowledged as effective (albeit unfair if the truth is what is being sought). But it would be a gross miscarriage of the FCC's duties to allow this strategy to continue!

We therefore implore the FCC to issue an order regarding its interpretation on all the "open issues" requested within the petitioners Declaratory Ruling filing in September 2006 – not just the so called "transfer issue".

Respectfully submitted,

_____//Signed//_____

Larry G Shipp

For: Larry G Shipp and Combined Companies, Inc.

EXHIBIT A

** All material on this page is reissued except as otherwise noted. **

2.1.8.D. Transfer of Assignment (continued)

2. If, within fifteen days after AT&T receives a fully executed original of the Transfer of Service form, AT&T notifies the Current Customer or New Customer in writing that a deposit is required in connection with the intended transfer pursuant to Section 2.5.6., preceding, and the requested transfer is not otherwise rejected as provided in 1., preceding, then the Effective Date of the transfer will be the date on which the deposit is furnished, provided that the requested transfer or assignment will be deemed to be withdrawn if a required deposit is not furnished within thirty (30) days after the date the deposit request is made. Nx

E. The Current Customer remains jointly and severally liable with the New Customer for any obligations existing as of the Effective Date of the transfer, except as provided in 1., following. These obligations include, for example: all outstanding indebtedness for the service, the unexpired portion of any applicable minimum payment period(s), the unexpired portion of any term of service and usage and/or revenue commitment(s), and any applicable shortfall or termination liability(ies). Mx Nx Mx

1. If the service being transferred or assigned is subject to an AT&T term **plan,** flex **plan,** or other discount **plan** with revenue or volume commitments offered under this Tariff, or a Contract Tariff under which WATS is provided **(a Pricing Plan),** then, to the extent specified in (a) through (c) following, **the Current Customer is relieved of liability for charges that may be incurred after the Effective Date of the transfer,** either as a result of a failure to meet revenue or volume commitments or monitoring conditions associated with such Pricing Plan (Shortfall Charges) or as a result of the discontinuance with liability of such Pricing Plan (Termination Charges). For purposes of these provisions, a charge is incurred on the date that the events giving rise to the charge become fixed (i.e., on the last day of a commitment period or the day on which a Pricing Plan is discontinued), not on the date the charge is billed.

(a) For a **Shortfall Charge** incurred for a commitment period that includes the Effective Date of the transfer, the Current Customer remains jointly and severally liable with the New Customer only for a percentage of the total Shortfall Charge equal to the number of days in the

commitment period prior to such Effective Date divided by the total number of days in the commitment period.

(b) For a **Termination Charge** incurred less than 180 days after the Effective Date of the transfer, the Former Customer remains jointly and severally liable with the New Customer only for a percentage of the total Termination Charge equal to the difference between 180 and the number of days between such Effective Date and the date on which the Termination Charge is incurred, divided by 180.

(c) For a **Shortfall Charge** incurred for a commitment period after the commitment period that includes the Effective Date of the transfer, or for a Termination Charge incurred at least 180 days after the Effective Date of the transfer, the Former Customer is fully relieved of liability

F. Nothing herein or elsewhere in this tariff shall give any Customer, assignee, or transferee any interest or proprietary right in any 800 Service telephone number.

Certain material on this page formerly appeared on Page 20.
Effective date of material filed under Transmittal No. 9229 is advanced to May 10, 1996 under authority of Special Permission No. 96-0468.

x **Issued on not less than one day's notice under authority of Special Permission No. 96-0468.**